AS TO THE NECESSITY OF CONSENT TO RENDER SURGICAL OPERATIONS LAWFUL.

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THE purpose of this discussion is to state the law as it appears to be; but we also wish it to be understood that to relieve the surgeon of annoyance, litigation, and expense, full and clear consent should be had in all cases whenever possible.

Only four decisions directly on the subject of this opinion have, up to the present time, been rendered by Courts of the last resort within English or American jurisdiction.

They are: McClallen *vs.* Adams, 19 Pickering (Mass.), 333. State *vs.* Housekeeper, 70 Maryland, 162. Pratt *vs.* Davis, Appellate Court of Illinois, February, 1905. Beatty *vs.* Collingworth (an English case), Central Law Journal, vol. xliv, page 153.

Herein we will simply refer to these cases without quoting the reports.

The operation in each of the cases above referred to, while believed advisable by the surgeon in each instance, does not appear to have been performed in cases demanding immediate operation as the only chance to save life. The opinion rendered in Pratt *vs.* Davis is the most recent and by far the most exhaustive opinion of the four, and recognizes the other three cases as authorities.

It will be of material aid in securing a clear analysis of this subject to divide the requirements for a surgical operation into two classes.

FIRST: THOSE WHERE A SURGICAL OPERATION IS ADVISABLE, BUT AN IMMEDIATE OPERATION IS NOT IMPERATIVE TO SAVE OR PROLONG LIFE.

SECOND: THOSE WHERE AN IMMEDIATE OPERATION IS NECESSARY AS THE ONLY COURSE OF TREATMENT KNOWN WHICH MAY SAVE OR PROLONG THE PATIENT'S LIFE.

Consent may be express or implied. That consent will be implied where one places himself in the hands of a physician or surgeon and submits to an operation is the law set forth in all the cases above mentioned.

A. AS TO THE CONSENT OF AN ADULT.

In the cases where operations are advisable but an immediate operation is not imperative to save or prolong life, the consent of the patient is required, and is sufficient to make the operation lawful, and the operator is not liable for any error of judgment, provided he has exercised that care and skill which the law requires. Pratt *vs.* Davis, Supra; State *vs.* Housekeeper, Supra; McClallen *vs.* Adams, Supra; State *vs.* Gile, 8 Wash., 12; Comm. *vs.* Pierce, 138 Mass., 165.

"Under a free government at least the free citizen's first and greatest right, which underlies all others,—the right to the inviolability of his person, in other words, the right to himself,—is the subject of universal acquiescence, and this right necessarily forbids a surgeon or physician, however skilful or eminent, who has been asked to examine, diagnose, advise, and prescribe, to violate without permission the bodily integrity of his patient, by a major or capital operation, placing him under an anæsthetic for that purpose and operating on him without his consent." Pratt *vs.* Davis, Supra.

The Court in stating the above had the facts of the particular case in mind which was before the Court, as elsewhere in the same opinion the Court said:

"Perhaps, too, the various cases which might be supposed of sudden and critical emergency in which the surgeon would be held justified in a major or capital operation, without express consent of the patient, might be referred to the principle of implied license." Pratt *vs.* Davis, Supra.

If the patient be a wife, her consent to the operation is all that is necessary (provided the wife be compos mentis). It is prudent to notify the husband, but it is not necessary. Even if he refuses consent, the consent of the wife is sufficient. McClallen *vs.* Adams, Supra; State *vs.* Housekeeper, Supra.

If the patient is non compos mentis, hence incapable of consenting, it would appear that the consent of the person (or persons) in control over the person of the lunatic is necessary. There must be no doubt of the patient being incapable of consent. The surgeon's opinion is not sufficient. A judicial inquiry, first determining the patient's insanity, would relieve the surgeon of liability of operating without consent if the patient afterwards brought action against him. Pratt *vs.* Davis, Supra. The surgeon should also satisfy himself as to parties legally in control of the person. Pratt *vs.* Davis, Supra. In the case of an insane wife, the consent of the husband might not be sufficient, for the same reason that a husband cannot restrain the liberty of his wife on the ground of insanity, without having an inquiry judicially made and her insanity legally declared. Pratt *vs.* Davis, Supra.

In the second class of operations, to wit, *where an immediate operation is imperative as the only chance to save or prolong the patient's life, and hence that death would certainly and positively result without the operation,* the consent of the patient, when an adult, would of course be sufficient, as in the first class of operations, to make it lawful.

"And even if the disease resulting in the patient's death is caused by the operation, the surgeon is not liable if he performed the operation with the patient's consent, and under the belief that the operation was proper to be performed." State *vs.* Housekeeper, Supra.

However, in such positive life and death cases, the question naturally arises, Would an operation be lawful against the will of the patient? It is quite unlikely that such a case will ever arise, as it would be a rare case indeed where a surgeon would operate at such a time. The danger and risk to a surgeon of an action at law under such a set of facts, is the difficulty which would likely arise in getting the evidence and facts so that the jury, and also the Court, would be convinced that the operation was the only course of treatment to be pursued, that the said operation did not cause the death or did cause the recovery of the patient. The plaintiff gen-

erally can secure some other physician who honestly, or dishonestly, will be found to disagree with the surgeon's diagnosis, prognosis, or mode of treatment.

Further, it would appear that *a surgeon operating against the will of a patient would be liable for any error of judgment, regardless of his due care and skill.*

But granted that the surgeon did operate against the will of the patient, when the operation was the only chance to save or prolong the patient's life and the operation did not cause the patient's death, it would appear under the law that the surgeon would not be liable, for the reason that society has a higher right to the individual's life than the individual has himself (an individual not having the right to dispose of his own life). Under the facts just stated, if the patient recovers by reason of the operation, clearly he has no action, as what was done by the surgeon was done for the benefit of the person and there is no harm done, and hence no element of damage upon which to base a recovery, even though there is a technical trespass. If the patient dies, that which was done for him was just as much for his benefit, and his death was not caused by the operation nor was life shortened, and hence there is again no element of damages upon which to base recovery.

Further, under such a set of facts, it would be impossible for the operation to be the proximate cause of death. For this reason there could be no recovery in law.

"If a physician be guilty of malpractice, but the operation, no matter how gross malpractice, was not the proximate cause of death, there can be no recovery." Braunberger *vs.* Cleis, N. S. iv, 587, American Law Register.

If the death of a patient upon whom a surgeon has performed an operation results from disease, and not from the operation, the surgeon is not liable for such death. State *vs.* Housekeeper, Supra; Wohlert *vs.* Seibert, 23 Sup. ct. (Pa.). 213.

AS TO OTHER OPERATIONS DONE OF NECESSITY.

"*A class of exceptions as to which there is not much authority, but which certainly exists in every system of law,*

is that of acts done of necessity to avoid a greater harm, and on that ground justified. Pulling down houses to stop a fire, and casting goods overboard, or otherwise sacrificing property, to save a ship or the lives of those on board, are the regular examples. The maritime law of general average assumes, as its very foundation, that the destruction of property under such conditions of danger is justifiable. In these cases the apparent wrong 'sounds for the public good.' There are also circumstances in which a man's property or person may have to be dealt with promptly for his own obvious good, but his consent, or the consent of any one having lawful authority over him, cannot be obtained in time. Here it is evidently justifiable to do, in a proper and reasonable manner, what needs to be done. It has never been supposed to be even technically a trespass if I throw water on my neighbor's goods to save them from fire, or, seeing his house on fire, enter on his land to help in putting it out. NOR IS IT AN ASSAULT FOR THE FIRST PASSER-BY TO PICK UP A MAN RENDERED INSENSIBLE BY AN ACCIDENT, OR FOR A COMPETENT SURGEON, IF HE PERCEIVES THAT AN OPERATION OUGHT FORTHWITH TO BE PERFORMED TO SAVE THE MAN'S LIFE, TO PERFORM IT WITHOUT WAITING FOR HIM TO RECOVER CONSCIOUSNESS AND GIVE HIS CONSENT. These works of charity and necessity must be lawful as well as right." Webb's Pollock on Torts, American Edition, pages 199 and 200.

See also, affirming above, Wharton's Criminal Law, Section 146:

"Perhaps, too, the various cases which might be supposed of sudden and critical emergency in which the surgeon would be held justified in a major or capital operation without express consent, of the patient might be referred to the principles of implied license." Pratt *vs.* Davis, Supra.

B. AS TO THE CONSENT OF A PARENT PREVIOUS TO AN OPERATION UPON MINOR CHILDREN.

In any discussion as to the necessity of consent of a parent to surgical operations upon minor children (since no

cases on this subject have ever come up for decision within English jurisprudence), we must look to the basic principles of law governing the matter, for the authority of our statements. Further, the question arises, when does the child arrive at such an age that its discretion is presumptively sufficiently developed that it may have the right to decide as to its need of an operation, without the parent's consent, and against the parent's consent? This would appear to be at fourteen years of age, as will be set forth further on in our opinion.

Under the law in general, when a presumption would arise that the child had or had not arrived at the age of discretion in such matters, that presumption either way would be open to rebuttal on evidence shown, as to the mental capabilities of the child.

Under the Roman Law the father had absolute control of the life of his child. But this was never true under English Law. The duties of the father to the child are those necessary for its maintenance, protection, and education. THE POWERS OF THE FATHER OVER THE CHILD ARE FOR THE PURPOSE ONLY TO ENABLE HIM TO PERFORM HIS DUTIES TOWARDS THAT CHILD AS TO MAINTENANCE, PROTECTION, AND EDUCATION, AND ENABLE HIM TO RECEIVE IN RETURN THE BENEFIT OF THE SOCIETY AND SERVICE OF THAT CHILD. Schouler on Domestic Relations, page 383; 1 Blackstone's Commentaries, page 452; 2 Kent's Commentaries, 203.

Under the Common Law the father had no other powers over the child, except as was necessary to obtain these objects, and no other powers have been conferred on him, except to better enable him to perform his duties, and to entitle him to the full benefits of the society and service of the child.

During the more tender years of an infant's life, a child is not amenable to the laws for its acts, not having sufficient discretion to know right from wrong. According to Blackstone, the age of discretion is twelve years. A child of twelve or fourteen years of age can give a valid consent to marriage. Ward's Estate, 30 Pittsburg L. J., 394. Beelman *vs.* Roush, 26 Pa. 509. State *vs.* Lowell, 78 Minn. 166.

A father has no right to control the rights of his minor child, who has arrived at the age of discretion, in relation to public worship. Commonwealth *vs.* Sigman, 2 Clark, 36. Commonwealth *vs.* Edmunds, 2 Legal Gazette, 98.

A presumption arises at law as to a child's capacity to be guilty of contributory negligence if the child be over fourteen years of age, and hence that they have such discretion as to be sensible of danger. Kehler *vs.* Schwenk, 144 Pa., 348.

In Habeas Corpus proceedings for the custody of children over the age of discretion, the Courts of Pennsylvania take into consideration the wishes of the child. In re Fitzpatrick, 9 Kulp, 309.

In the matter of selection of guardians, Courts of Pennsylvania must consult minors over fourteen years of age.

A child of seven years has been held guilty of trespass in this State.

"After the age of fourteen, the presumption is that the infant has criminal capacity." May's Criminal Law, page 27, and cases thereunder.

"On the attainment of fourteen years of age the criminal actions of infants are subject to the same mode of construction as those of the rest of society." Russell on Crime, chapter ii. page 7.

"Force to the person is rendered lawful by consent in such matters as surgical operations. In the case of a person *under the age of discretion*, the consent of that person's parent or guardian is *generally* necessary and sufficient." Webb's Pollock on Torts, pages 186 and 187. See also "Law and its Relation to Physicians." Taylor, page 315.

It will be noted in the above quotation that it does not say, in the case of a minor, or a person under legal age, but expressly states "under the age of discretion."

The age of discretion would be the age at which a child can comprehend the danger of its condition and the danger of an operation when sufficiently informed by a skilled physician or surgeon. In other words, when the child is mentally capable to give consent to a surgical operation.

Surely no higher degree of mental capabilities would be necessary to raise the presumption of capability to consent to surgical operations than those required to raise the presumption of a child's capacity to be guilty of contributory negligence, or to be held presumptively liable for the most serious crimes.

That a child above twelve or fourteen may consummate a valid marriage even against the consent of the parent certainly does support the opinion that a child at the age of fourteen has presumptively the capacity to consent to a surgical operation. Even the crime of rape, recognized as one of the most hideous at Common Law, was never possible if the girl was fourteen and consented to the act. (To make the age of consent otherwise has required the enactment of a statute.)

Hence the age of discretion when presumptively a minor is capable of consenting to a surgical operation without or against the parent's wish would be over fourteen years.

Further, the parent of a child is under duty to see that his offspring does not suffer from the necessities of life, and this includes medical necessities, and conscientious or superstitious opinions of parents that it is wrong to have medical aid is no excuse. See Wharton and Stillé, Medical Jurisprudence, third volume of fifth edition, page 441, and cases thereunder mentioned.

SO THAT IT WOULD APPEAR TO BE THE LAW THAT IN THE FIRST CLASS OF CASES OF OPERATIONS, TO WIT, WHERE AN OPERATION IS ADVISABLE, BUT NOT IMPERATIVE TO BE DONE IMMEDIATELY FOR SAVING OR PROLONGING THE LIFE OF THE CHILD, IF THE CHILD IS UNDER THE AGE OF DISCRETION, CONSENT OF THE PARENT IS NECESSARY; the child being incapable to decide as to the skill of an operator, to choose the time of the operation, etc.

But this does not mean that the parent has a right to deny the child the benefit of an operation, when this is clearly and positively the only course of treatment known.

In fact, the father is bound to have the operation performed on the child if the child's condition demands it, as a

matter of medical necessity. In other words, it must be clearly held in mind that the father has not the right over the health and life of the child to the child's positive detriment. The law will hold him to account if he refuses such benefit.

WHERE THE CHILD IS OVER THE AGE OF DISCRETION (while, if possible, it is prudent to have the parent's consent, because no surgeon wishes to be involved in litigation), yet if it is such a clear and positive case that the only course of treatment is that of an operation, it would appear sufficient to have the child's consent to perform the operation, for the reason that the child has a higher right to its own health and life than the father's right over the child's person. Further there can be no element of damages where the operation is to the benefit of the child, the benefit conferred being greater than any harm done.

Probably, as no decision has been rendered as to the law under these facts, the Court would incline, if the operation be proven of no benefit or that the benefit was not greater than the harm, to allow the parent to recover for the loss of service of the child, even if the child be over the age of discretion. However, as the husband's rights to the wife are the society and service of the wife and those of the parent to the child are the same, the identical reasons which the Court has given for ruling that the wife's consent only is necessary, would appear to apply with equal force as to the consent of a child above the age of discretion, being the only consent necessary and the parent's consent unnecessary. And as the husband cannot recover under the facts for the wife's services, for the same reasons the parent cannot recover for the services of the child.

AS TO THE CONSENT OF THE PARENTS IN AN OPERATION UPON A CHILD WITHIN THE SECOND CLASS OF OPERATIONS, to wit, those where an immediate operation is necessary as the only course of treatment which may save or prolong the child's life (while it would be prudent here, as in all cases to avoid litigation, to have the parent's consent), if the child be of the age of discretion and consents, the consent of the parent does not appear necessary.

If the child be of tender years, the surgeon would probably be liable only for any error of judgment, if he operated against the parent's will. The risks of litigation and liability, however, would be almost identical to those referred to in our discussion of operations, in "life and death cases" upon adults against their will.

In serious illness, the father is held by the law under stern duty to provide skilled medical attention whenever possible to do so. It would appear from the very fact that the duty falls upon him to procure a physician, that it is not within the father's judgment to decide what shall be the course of treatment, unless there be a choice known to him, for the very reason that the law demands that he call in a skilled physician in serious illness to give the child the benefit of medical knowledge, of which the father is ignorant.

Where it appears under the evidence that the physician did that which was the only possible thing to be done in order to give the child its chance of life, the very law which requires the father to provide skilled medical attention would require him to allow that this be done. The parent's right to prohibition under such conditions would mean, and mean nothing else, but that the father had a right even to the life of the child, which is an absurd contention in English jurisprudence.

The child has a higher right as to its own life than the father's right as to the person of the child. Society has a still higher right as to the life of an individual member; and hence, where under all the evidence it would appear that the surgeon did, *in a time of life or death, that which was the only course of treatment to be pursued, even if he did it under such circumstances that it was clearly against the wishes of the parent, the surgeon would not appear to be liable.*

The surviving action to parents on the death of a child is for loss of pecuniary services. If the operation does not cause death, no loss of service can be shown as the result of the surgeon's act, and hence the surgeon has no liability. But to protect himself from any error of judgment it would appear the surgeon should have, as a rightful precaution, the

parent's consent, at least where the child is under the age of discretion.

The statements made in our discussion as to operations of the second class upon adults and *against their will*, would govern as to operating, in the same class of cases upon minors, over the age of discretion against their will, or upon children, *under* the age of discretion, against the will of the parent.

It is as old as the Common Law that if a man be drowning and one goes to his aid, and in saving him, does necessarily and incidentally violence to his person, the one thus aiding is not liable, whether he succeeds in his efforts or not. What he did was for the benefit of the other and for society, and that which the law commends to be done rather than not to be done.

As to other operations done of necessity, such as where a child is found unconscious, and a competent surgeon perceives that an operation ought forthwith to be performed at once, it is lawful for him to do so, the same as in the case of adults previously discussed and for the same reasons.

The use of the term "surgeon" herein of course includes only those who are qualified according to law, to hold themselves out as such to the public.

Also it is to be understood that the diagnosis, prognosis, and operation have been made with that ordinary due care and skill, taking into consideration the advanced knowledge of the times, which is required of all physicians and surgeons by law.

SUMMARY.

Consent of an *adult patient* in good mental health is sufficient to relieve the surgeon of liability in all classes of cases.

Lunatic Patients.—The surgeon should have the person legally declared a lunatic, if time permits, and have the consent of those legally in charge of the lunatic. If the urgency of the case does not permit such delay, the consent of those directly in control of the lunatic and the "consent" of the lunatic, if possible, should be secured.

In all cases of sudden and critical emergency the law will imply consent or justify the surgeon's act by implied license. This is true as to all individuals, adults or minors.

Minor Children.—Consent of parent and child if possible should be had to protect the surgeon against *litigation.* Under the age of fourteen years the parent's consent is especially necessary to protect the surgeon against litigation and error of judgment. Over the age of fourteen years the consent of the child, in serious cases, would appear sufficient.

Since writing the above opinion, a case has been handed down by the Supreme Court of Minnesota which the Author considers supports the above opinion. The case is Mohr *vs.* Williams, 104 N. W. Reporter, page 12.

J. F. S.